

Ditch the Rule

This Picture Is Why Farmers Are Worried About WOTUS

In the spring of 2014 the U.S. Army Corps of Engineers declared this **swath of land** running across this farmer's field to be "waters of the United States." The Corps said this is a "tributary" under the proposed new definition (which the Corps is already applying, claiming it is only a "clarification").¹

Note – This photo was taken 4/10/2014.



What Does It Mean?

For over a half-century, this Tennessee farm has been row-cropped. But now the federal government has declared this land to be "waters of the United States" That fundamentally changes how the land can be used. Unless the farmer is willing to go to court against the nearly unlimited legal resources of the U.S. Government, the Clean Water Act prohibits **any** activity that causes "pollutants" to fall or be placed into this feature from any "point source" (any "conveyance") without a permit.

¹ For more information on this example, please contact Don Parrish of the American Farm Bureau Federation – donp@fb.org.

What permits are required? What's the big deal?

Section 404 permits for discharges of “dredge and fill” material (moving dirt)

Discharges of “dredged or fill material” (dirt) can be permitted by the Corps of Engineers.

- Congress has exempted normal farming activities from Section 404 permitting, and this long-established farm would qualify for that exemption (though many farms would not). Except... any movement of dirt that would eliminate the “bed, bank or ordinary high water mark” of this feature would need a 404 permit or else would be a violation of the Clean Water Act. (79 Fed. Reg. at 22,204)
- That means even just plowing through this ephemeral feature would probably be illegal under the agencies’ pending WOTUS proposal. The farmer would be open to EPA, Corps or citizen lawsuits.
- Applying for a Section 404 permit automatically triggers Endangered Species Act (ESA) consultation and National Environmental Policy Act (NEPA) and National Historic Preservation Act review. **The process means potentially years of delay and tens of thousands of dollars— with no guarantee that a permit will ever be granted.**

Section 402 permit for the use of fertilizers or pesticides

Discharges of other “pollutants”—like chemicals and even “biological material”—require a Section 402 (NPDES) permit, which may be issued by EPA or, in most states, by the state environmental agency. As a result, the farmer:

- Cannot apply pesticide in this feature without a permit. (Note: Some, but not all, states may have “general” permits for pesticides that are easier to obtain.);
- Cannot use a manure spreader in this feature to fertilize his crops unless he has a permit. (Note: There are no general permits currently available for fertilizer applications.);
- Will face severe potential penalties (up to \$37,500 per day) for any discharge without a permit, including lawsuits from citizen activists, the state or EPA—even criminal enforcement;
- Must comply with the terms of any permit issued, including specific application practices, recordkeeping, reporting and monitoring requirements;
- Will face the same severe potential penalties for any noncompliance with the permit, including paperwork violations.

Protection of Water Quality – NO

Regulation of Land Use - YES